No. 80-1329

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

FIDEL RAMOS, et al.,

Petitioners,

v.

The Honorable RICHARD D. LAMM, Governor of the State of Colorado, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

The State of Colorado accepts the plaintiffs' statement regarding the parties, the decision below, jurisdiction, and the constitutional and statutory provisions involved. However, the action of the court of appeals requires a restatement of the question presented.

QUESTION PRESENTED

Did the court of appeals err in reversing the district court's order insofar as it applied to classification and idleness and in remanding the case to the district court to devise a new remedy taking into consideration the changes in conditions which had occurred since the time of trial?

SUPPLEMENTAL STATEMENT OF THE CASE

The statement of the case contained in the plaintiffs' petition for certiorari fails to state the context in which the present case was tried. As is detailed in the petition for certiorari filed by the defendants in this case (hereinafter the state), long before Fidel Ramos filed suit, the State of Colorado was committed to replacing its antiquated prison, the Canon Correctional Facility (CCF)[1] and completely restructuring its system of corrections. See the state's petition for certiorari in *Lamm v. Ramos,* No. 80-1340, filed February 6, 1981, at 2-3. Testimony at trial indicated that construction was under way on two new modular "state-of-the art" prisons costing over 18 million dollars. See defendants' exhibit 1137, a copy of which is contained in the appendix to the state's petition for certiorari at page A-143.[2] According to the evidence introduced at trial, the new facilities were to be completed by January or February 1981 (A.56). In fact, the new maximum security prison, the Centenial Correctional Facility, opened on December 22, 1980. The new close security prison, the Shadow Mountain Correctional Facility, opened on January 26, 1981.[3]

Colorado also established a new Division of Correctional Industries to combat job idleness and teach job skills. 1977 Colo. Sess. Laws ch. 223 at 903. The Department of Corrections instituted new rules and regulations to help insure inmate safety, adopted a new classification system (R. vol. 30 at 96), improved food and medical services (R. vol. 30 at 63), instituted a new diagnostic system (R. vol. 30 at 159), and broadened programs (R. vol. 37 at 78). All of these facts are relevant to a consideration of what, if any, remedy is

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[1] At the time of trial, Colorado's only maximum security prison for men was the Canon Correctional Facility. It is commonly called "Old Max." In this brief it will be referred to by its name, "CCF," or "the old prison."

[2] References marked A. ____, refer to the appendix to the plaintiffs' petition for certiorari. References marked A-____ refer to the appendix to the state's petition for certiorari.

[3] "Close security" is an intermediate designation between medium security and maximum security.

necessary to stop the violations which the district court found to exist at the old prison. *See, Holt v. Sarver,* 442 F. 2d 304, 309 (8th Cir. 1971).

The statement of the case contained in the plaintiffs' petition for certiorari does not accurately summarize the opinion of the court of appeals. In its opinion, the court of appeals stated (A.13):

> We conclude that in the areas of shelter, sanitation, food, personal safety, and medical care — the core areas in any Eighth Amendment claim, the district court's findings and conclusions of violations of the plaintiffs' rights are entirely justified and supported by the record. *We do not think, however, that the record in this case requires or justifies going into all of the concepts on penalogy pressed by the plaintiffs and adopted by the district court's opinion – the concepts of motility, classification, and idleness – since the shortcomings in these areas are not of constitutional dimension.* While there may be a point where abuse in these areas would constitute an actual violation of the Eighth Amendment guarantee, we hold that in this case, the present record and the findings on these subjects do not warrant the court's broad remedial orders (485 F. Supp. at 170) intruding into these areas of prison administration.

(emphasis added) (footnote omitted).

The statement of the case contained in the plaintiffs' petition is inaccurate because it fails to distinguish between the issues of liability and remedy. As the preceding discussion shows, the Tenth Circuit not only vacated the trial court's remedial order, but *it reversed the finding of liability in the areas of idleness and classification.*[4] In the argument opposing the plaintiffs' petition, these issues will be addressed separately.

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[4] The court of appeals also held that the evidence did not support the trial court's conclusion that prisoners were unconstitutionally deprived of a right to visitation (access) (A.40-45). As the plaintiffs do not contest this portion of the court of appeals' decision, the state will not discuss it further.

ARGUMENT IN OPPOSITION TO GRANTING THE PLAINTIFFS' PETITION FOR CERTIORARI.

A. THE TENTH CIRCUIT PROPERLY VACATED THE DISTRICT COURT'S REMEDIAL ORDER.

At the conclusion of its decision, the court of appeals vacated the district court's remedial order and remanded the case for further proceedings (A.54-57). This action was entirely appropriate, since portions of the district court's remedial order were erroneous, and other portions were outdated.

To understand the Tenth Circuit's actions, it is necessary to examine the structure of the district court's opinion. The heart of the opinion is the district court's conclusions of law. It held that the conditions of confinement at CCF were unconstitutional in six areas:

1. Physical environment (A.125)
2. Idleness (A.126)
3. Physical safety (A.125)
4. Health care (A.131)
5. Classification (A.133)
6. Access (both visitation and access to the courts) (A.138)

In its remedial order, the district court ordered that, "Old Max shall be closed. It will no longer be used to confine inmates either temporarily, permanently or on a standby basis." As a condition of obtaining a stay of the order of closure, the district court directed the state to prepare plans according to five principles (A.158-59):

1. Productive activity
2. Motility
3. Health
4. Integrity and safety
5. Coherence

These five principles reflected the first five areas in which the court had found liability against the state. (For some reason, no principle corresponded to access.) These principles will be examined individually.

The principles of health and integrity and safety are irrelevant to the issues before the Court, since they are not the subject of the plaintiffs' petition for certiorari.

The principle of coherence required that the state develop a coherent classification system (A.159). Because the court of appeals reversed the district court's finding of liability on this ground (see subsection C, *infra),* there is no need for the state to modify its present classification system. Consequently, this portion of the remedial order was properly vacated.

Similarly, the principle of productive activity was to be the remedy for the finding of liability on the issue of idleness. Since the court of appeals found that the amount of idleness at the old prison was not unconstitutional (see subsection B, *infra),* there was no need for a remedial order in this regard.

"Motility" (the district court's novel term) deserves special consideration. It relates both to the physical facilities (cells, some of which were too small) and idleness. Under this principle, no prisoner "may be housed in a cell of a size less than 80 square feet for more than 20 hours a day. If the confinement space decreases from 80 square feet the hours of confinement must be reduced proportionately" (A.158-59). There are several reasons why this portion of the remedial order was properly vacated.

First, in the Tenth Circuit, a prisoner is entitled to be housed in a cell containing sixty square feet. Eighty square feet is the standard of the American Correctional Association. *Battle v. Anderson,* 564 F.2d 388 (10th Cir. 1977). See *Bell v. Wolfish,* 441 U.S. 520, 543-44, n.27. (1979). Second, the principle of motility was completely inconsistent with the principle of integrity and safety. Security is the reason that some prisoners were kept in their cells for twenty hours

a day (see subsection B, *infra*). The implementation of the principle of motility would have required the state either to significantly reduce the prison population and remodel the prison to make larger cells (something it probably could not have done in the short time that the prison was to be kept in operation) or, alternatively, to let prisoners in cellhouses 3 and 7 out of their cells for several more hours a day, an unacceptable option considering the security risks involved. Given these realities, the principle of "motility" was properly vacated by the Tenth Circuit.

There is an even more fundamental reason that the remedial order was vacated. The order of the district court issued on December 20, 1979 (A.161). The Tenth Circuit stayed this order, except as it applied to health care, pending the state's appeal (A.3, n.1). The Tenth Circuit's decision was rendered on September 25, 1980, and the mandate issued in November 1980, after the petitions for rehearing were denied (A.59-61). By this time, almost a year had passed; construction on the new facilities was almost complete. The Tenth Circuit stated (A.57):

> [I]t is apparent that events have moved forward, that new measures have been taken, and whether the remedial order should stand or be modified should be reconsidered after further proceedings in light of changed conditions and this opinion.

Consequently, the court of appeals remanded the case to the district court.[5] In so ruling, the appellate court did not unduly restrict the powers of the district court. In fact, citing *Hutto v. Finney*, 437 U.S. 678 (1978), the court held that the district court's power to enter equitable orders was "broad" but must be "tempered by the public interest involved" (A.56).

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[5] The plaintiffs' assertion at pages 13-15 of their petition that the court of appeals vacated the trial court's remedial order because the state made "non-record assertions as to 'changed conditions'" is plainly incorrect. The record before the court of appeals was replete with references to the fact that new facilities were being built. See, *e.g.*, (R. vol. 33 at 5-47).

In *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977), this Court listed three criteria for use by federal courts in devising equitable remedies: (1) the remedy must be related to the conditions alleged to offend the constitution; (2) the remedy must be remedial in nature; (3) the remedy must "take into account the interests of state and local authorities in managing their own affairs, consistent with the constitution." The decision of the court of appeals fully complies with *Milliken*.[6] The court merely remanded the case to the district court so that it could determine: (1) what are the present conditions to which the remedy must relate; (2) is a remedy necessary; (3) what are the interests of the state, given the change in circumstances? Thus, the portions of the Tenth Circuit's opinion about which the plaintiffs complain are in no way inconsistent with the prior decisions of the Court.

B. THE TENTH CIRCUIT COURT OF APPEALS PROPERLY FOUND THAT THE EVIDENCE DID NOT SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE DEGREE OF IDLENESS AT THE OLD PRISON WAS UNCONSTITUTIONAL.

The Tenth Circuit correctly ruled that the plaintiffs failed to establish that the level of idleness at the old prison was unconstitutional. Prisoners at the old prison were housed in five cellhouses.[7] Of these cellhouses, idleness was not a problem in cellhouses 1, 4, and 5, since the inmates assigned to these cellhouses were workers. The working inmates at the old prison, like the rest of us, spent the

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[6] *Milliken* is a school desegregation case. While the state does not concede that the remedies applicable to an eighth-amendment violation are the same as those applicable to a violation of the equal protection clause, there is nothing in the court of appeals' decision in the present case which is inconsistent with *Milliken*.

[7] Although the number of inmates assigned to the cellhouses varied from day to day, cellhouse 1, which had a capacity of 384, housed approximately 360 inmates all of whom had jobs (A.18). Cellhouse 4 was a minimum-security building located outside the walls of the prison. Cellhouse 5 was located under the infirmary and housed about 20 trustee inmates who worked at the infirmary. Additionally, some inmates with particular medical needs were housed in the infirmary building (A.18-19). Cellhouses 2 and 6 were torn down years ago and were not involved in this litigation.

majority of their working days on the job. On weekends, the gym and main yard were available for the workers' use eight hours a day (R. vol. 37 at 162-63). In the evening, workers could participate in educational programs (R. vol. 29 at 16). Workers were also eligible to use the hobby shop, which was unavailable to nonworkers (R. vol. 37 at 162-63; vol. 29 at 5-6). During daylight savings time, workers could participate in evening "yard."

At the old prison, idleness was an issue principally in cellhouses 3 and 7. Cellhouse 3, which housed only 86 prisoners, was used to house administrative segregation and protective custody inmates, none of whom was eligible to work. The cellhouse contained no members of the general prison population. Cellhouse 3 inmates were released from their cells only for showers, "yard," and visitation but they spent over twenty hours a day locked in their cells (A.85-86). The state notes, however, that the problem of idleness at cellhouse 3 has been resolved; the cellhouse 3 population has been moved to the new maximum security prison, where, because of the modular architecture, inmates are only required to spend eight hours a day (time when they are asleep) in their cells. See *Bell v. Wolfish, supra,* at 525, 543-44, n.27.

Cellhouse 7 housed three classifications of prisoners. Of its roughly 340 prisoners, about two hundred were "transitional workers" — inmates who were part of the general prison population, but who had not yet been given a job. The balance of the inmates in cellhouse 7 were, like the inmates in cellhouse 3, in protective custody or administrative segregation. Like the prisoners in cellhouse 3, the inmates in cellhouse 7 spent over twenty hours a day in their cells. All prisoners at CCF were housed in single cells. The problem of isolation in cellhouse 7 has been remedied by the opening of the new facilities.[8]

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[8] Idleness existed at the diagnostic unit, where all male prisoners assigned to the Department of Corrections begin their period of incarceration regardless of where they are ultimately placed in the Colorado prison system. Since prisoners are only placed in this unit for a relatively short period of time, the state will not disucss this problem further.

The idleness of prisoners in cellhouses 3 and 7 was not unconstitutional, since it was the result of an effort to keep the old prison safe for both inmates and security personnel. In 1977, when Allan Ault became the Executive Director of the Colorado Department of Corrections, he found himself in charge of a prison which was largely out of control. He testified, "I thought it was fairly tenuous whether or not the staff was going to maintain control over the institution" (R. vol. 30 at 36). He made his first priority getting control of the institution. This included a policy of requiring some of the more dangerous prisoners to spend 20 hours or more a day in cells in cellhouses 3 and 7. He also assigned CCF a new superintendent, William Wilson, a "very firm individual" who "believe[d] in strict discipline" (R. vol. 30 at 61; Vol. 37 at 68). Dr. Ault also revoked many of the liberal privileges which had been given to prisoners during the 1960's. He emphasized, however, that none of this was done as punishment. As he put it, "I think the worst punishment is to allow inmates to kill each other" (R. vol. 30 at 37).

Dr. Ault's plan of action was premised on completing as soon as possible the new maximum security facility and the new close security facility, where he knew the problems of violence and idleness would largely be eliminated. He testified (R. vol. 30 at 72-73):

> I think the new policies that we had to implement — to me we had to implement them because of the record of violence and murder at Old Max — have paid off. I knew it was going to be a long two years before the new facility could be completed, but there hasn't been a murder at Old Max in the last year. Violence rates are down.
>
> . . . .
>
> [O]ur first effort in the new facility and in our programming or actions at the Old Max, that was to keep people alive, inmates and staff, and I think it has been fairly successful.

Clearly, the idleness imposed on the inmates in cellhouses 3 and 7 was a direct response to the security needs of the institution. This Court has repeatedly stated that where prison officials feel that a measure is necessary as a security precaution, "it is enough to say that they have not been conclusively shown to be wrong in this view." *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 132 (1977); *Bell v. Wolfish, supra,* at 555. Since the evidence in the record failed to establish that the prison authorities were "conclusively shown to be wrong" in their belief that the imposition of idleness on the inmates in cellhouses 3 and 7 was necessary, as a short-term measure, for the security of the prisoners, the Tenth Circuit properly held that the trial court erred in finding liability against the state on this ground.

C. THE TENTH CIRCUIT CORRECTLY RULED THAT THE EVIDENCE IN THE RECORD DID NOT SUPPORT THE TRIAL COURT'S CONCLUSION THAT THE CLASSIFICATION SYSTEM IN EFFECT IN COLORADO WAS UNCONSTITUTIONAL.

In its memorandum opinion, the district court concluded, "Though capable of redemption, the classification system is presently unconstitutional" (A.137).[9] The Tenth Circuit found that the record did not support this conclusion (A.13). The Tenth Circuit was correct.

When Dr. Ault arrived in 1977, he was confronted with a prison that had no effective classification system. Immediately, remedying this deficiency became one of Dr. Ault's highest priorities (R. vol. 30 at 95-96). From his earlier experiences as a prison administrator in Georgia, Dr. Ault was aware of the dangers of classifying inmates on the

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[9] "Classification" refers to the system by which inmates are categorized by prison authorities. This categorization is used to determine what type of security is necessary for a particular individual, where he should be housed, and what programs would be most beneficial for him. Not at issue here is the subject of regressive classification. *Compare, Meachum v. Fano,* 427 U.S. 215 (1976).

basis of subjective judgments rather than hard data (R. vol. 30 at 11-16). Consequently, the Department of Corrections entered into a contract with Dr. Herbert Eber, with whom Dr. Ault had previously worked, to design a new classification system (R. vol. 30 at 96-97; vol. 36 at 46).

Dr. Eber's system utilizes a battery of tests which are administered in the diagnostic unit, to which all male inmates assigned to the Department of Corrections are initially sent. These tests include a grade level test, I.Q. test, vocational interest test, and a 16 personality-factor test, which measures personality factors and vocational traits (R. vol. 20 at 114-16; plaintiffs' exhibit 20). These tests not only measure educational and vocational possibilities for the inmate, but are used to predict escape risk and the dangerousness of the individual. The results of these tests are analyzed by a computer which prints a report in plain English. For example, in plaintiffs' exhibit 20, a model classification report, under the heading "security" the report states:

> Inmate Roe [a fictitous name] seems quite strongly given to violence, and should be considered dangerous and handled with caution. There seems to be no more than normal risk of escape, but security in that area should also be substantial.

The report also indicated that Roe was suicidal. See plaintiffs' exhibit 20, form K-40.

While Dr. Eber's computer assembles data based on test scores and generates reports in English according to its programs, it makes no decisions. Decisions involving the classification of inmates are made by trained specialists known as "programmers" (R. vol. 37 at 98). These programmers have the results of the tests, the prison's history at the prison (if any), and in two-thirds of the cases, a presentence report. The programmers also interview the inmate and talk with people who have dealt with him in special contexts (R. vol. 36 at 98). Dr. Eber's tests are designed to assist the programmer in determining whether a person is dangerous, a high escape risk, self-destructive, or

has serious adjustment problems. Decisions in other areas are based on information coming from other sources.[10]

The classification system is used to make two important classification decisions. Each prisoner is assigned: (1) a security designation which determines how much freedom he will be given within the prison; and (2) a facility classification which determines in which facility he will be housed. Prior to the opening of the new facilities, the difference between these concepts was very important. The old prison housed maximum, close, medium, and, in cellhouse 4, minimum security designated inmates. All the inmates housed at the old prison had the same facility classification, that is, CCF. Nevertheless, because of their different security designations, the prisoners were treated differently. (For example, only nonmaximum security designated inmates were allowed to work outside the walls of the prison.) With the opening of the new facilities, it has become possible to bring the security classifications and the facility classifications more closely into line.

The district court found the classification system to be arbitrary for two reasons. First, the district court agreed with the plaintiffs' expert social scientist who testified that the Eber tests had not been verified to his satisfaction and that, in the scientific community, the burden is on the proponent of a system until it has been proved to be valid (R. vol. 26 at 95; A.136). In so ruling, the district court apparently ignored the testimony of Dr. Eber who stated that his test had been used effectively in Georgia to predict excape risks (R. vol. 32 at 84, 187); were "a good predicter of violence in a prison setting" (R. vol. 36 at 81); and had been successfully used at a women's prison to predict suicide risks (R. vol. 36 at 77-78).

The federal courts do not sit to resolve battles between social scientists, but should, in matters of internal prison

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[10] Classifications are automatically reviewed every 90 days so that the inmate's in-prison conduct plays a role in classifications made after the initial classification decision.

policy which relate to security, defer to the expert prison administrators. *Bell v. Wolfish, supra* at 554; *Jones v. North Carolina Prisoners' Union, supra; Pell v. Procunier* 417 U.S. 817, 827 (1974); *Procunier v. Martinez,* 416 U.S. 396, 404-05 (1974). Therefore, the trial court's belief that the Eber system is not a good one and is not accepted in the social scientific community, is not a basis for declaring the system unconstitutional.

The trial court was also critical of Colorado's classification system because the Department of Corrections established certain guidelines regarding facility classifications which applied regardless of the Eber tests. For example, all prisoners who have more than six years remaining on their sentence until they are eligible for parole, are given a maximum facility classification (plaintiffs' exhibit 20 at 49-50). There is, however, nothing constitutionally impermissible in such a classification system, since it is based on the security needs of the institution as preceived by the experts charged with administering the prison. See *Bell v. Wolfish, supra.* As the Tenth Circuit stated in *Marchesani v. McCune,* 531 F.2d 459, 462 (10th Cir.), *cert. denied,* 429 U.S. 846 (1976):

> Prison setting is, at best, tense. It is sometimes explosive, and always potentially dangerous. The judgments of prison authorities, under such circumstances, are often predicated on "educated" estimates or guesses resting on suspicion.

See also, Meachum v. Fano, 427 U.S. 215, 224 (1976) (the initial decision to assign a convict to a particular institution is not subject to audit under the due process clause, even though the degree of confinement may be quite different in different institutions); *Montayne v. Haymes,* 427 U.S. 236 (1976).

In the present case, the record establishes beyond any question that prior to trial Colorado instituted a new, computerized, sophisticated classification system. This was, in part, an attempt to provide for internal security at the pris-

on. Since no more is constitutionally required, the Tenth Circuit properly held that the district court erred in finding liability against the state on the ground that it had an unconstitutional classification system.

CONCLUSION

For the reasons stated above, the state asks this Court to deny the plaintiffs' petition for writ of certiorari.

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